NO. 1571

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EASTERN ASSOCIATED COAL CORP.,
Plaintiff-Petitioner,

v.

AETNA CASUALTY & SURETY COMPANY; AMERICAN HOME ASSURANCE COMPANY; HIGHLANDS INSURANCE COMPANY; FIRST STATE INSURANCE COMPANY; LEONARD RONALD HAYWARD and all other Underwriters at Lloyds subscribing to policy #2080712; EXCESS INSURANCE COMPANY, LTD.; INDEMNITY GUARANTEE ASSURANCE LTD.; LONDON & EDINBURGH INSURANCE COMPANY, LTD.; YASUDA FIRE & MARINE INSURANCE LTD.; NICHIDO FIRE & MARINE INSURANCE CO., LTD.; TUREGUM INSURANCE CO., LTD.; and BALOISE INSURANCE CO.,
Defendants-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. In a diversity case, is a court of appeals bound to reconsider and reverse its prior decision, which had reversed the district court, solely because a decision of a state appellate court cited the district court's decision, when:

(a) the state court decision cited the district court for a general and uncontested proposition of law;

(b) the proposition for which the district court was cited is not inconsistent with the court of appeals opinion;

(c) the state court controversy did not involve any of the issues litigated in the district court case;

(d) the state court's citation of the district court was *dictum;* and

(e) the state court was an intermediate appellate court?

2. Is the construction of the terms of a contract by the court a denial of the right to trial by jury?

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Rule Cited

Supreme Court Rule:

17 10

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The respondents respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Third Circuit's opinion in this case. That opinion is recorded at 632 F.2d 1068.

Statement of the Case

Petitioner, Eastern Associated Coal Corp. ("Eastern"), commenced this action to recover under business interruption insurance policies. Eastern's claim included its loss of earnings less the amount of normal expenses which were not incurred during the interruption. In addition, it sought to recover for expenses it incurred to satisfy a long term coal supply contract during the period. Respondents admitted coverage for Eastern's reduction in earnings less its unincurred expenses and offered to pay that sum but contested liability for the expense of fulfilling the long term contract (hereinafter "contract expense").

In the trial court, respondents moved for summary that they were not liable for the contract expense. The motion was denied, the court holding that the issue of coverage was a question for the jury. At trial respondents again moved for judgment as a matter of law based on the same proposition. The court refused so to rule and submitted all questions of coverage to the jury. A verdict was returned which included the contested element of the claim. Respondents moved for judgment notwithstanding the verdict on the ground *inter alia* that there was no coverage for the contract expense. The motion, insofar as it related to said issue, was denied.*

Respondents took timely appeal from the final judgment to the Court of Appeals for the Third Circuit. In a comprehensive unanimous opinion, the court held that

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* Respondents' motion also involved the contention that one portion of the claim was not established by the evidence and constituted surprise. That part of the motion was granted and the court reduced the judgment accordingly. Eastern does not seek review of that ruling.

the insurers were liable only for Eastern's loss of earnings less unincurred expenses and not for the contract expense. Eastern petitioned for rehearing with a suggestion for rehearing *en banc*. The petition was denied. Thereafter Eastern moved for leave to file a petition to recall the mandate and a petition for reconsideration of its petition for rehearing with a suggestion for rehearing *en banc*. The motions for leave to file were granted as was petitioner's motion to file a petition with excess pagination. The Court did not grant leave with respect to hearing *en banc*. The petitions to recall the mandate and for reconsideration of the petition for rehearing were based on the contention that the Third Circuit's original decision was inconsistent with the decision in *Berkeley Inn, Inc.* v. *Centennial Ins. Co.*, 422 A.2d 1078 (Pa. Super. 1980). The panel which had heard the appeal considered the petitions and thereafter denied them.

REASONS FOR DENYING THE WRIT

I

There is no inconsistency between the state cases cited by petitioner and the decision below which would give rise to the Question Presented in the petition.

The Question Presented in the petition is whether in a diversity case a Court of Appeals is bound to follow and apply the principles enunciated in a state appellate court decision. Petitioner argues that the Third Circuit failed to follow the substantive law of the Commonwealth of Pennsylvania in two regards:

1. It did not reverse its original decision in view of the holding in *Berkeley Inn Inc.* v. *Centennial Insurance Co., supra,* and

2. It construed the insurance policies at issue as a matter of law.

A review of the opinion in *Berkeley Inn* and the other cases cited in support of Eastern's contentions does not bear out petitioner's claim that the decision below was incorrect.

The petition states (p. 11) that in *Berkeley Inn* "the Pennsylvania Superior Court put its stamp of approval on the District Court's analysis of Pennsylvania law in the instant case by citing that very decision." In fact, that court did not even mention the district court's analysis. The only reference in *Berkeley Inn* to this case is as follows:

> "Generally, business interruption insurance is intended to return to the insured the amount of profit it would have earned had the event insured against not intervened. See 44 C.J.S. Insurance §48; Annot. 83 A.L.R. 2d 885; Eastern Associated Coal Corp. v. Aetna Casualty & Surety Co., 475 F.Supp. 586 (W.D. Pa. 1979); Supermarkets Operating Co. v. Arkwright Mutual Insurance Co., 257 F.Supp. 273 (E.D. Pa. 1966)." 422 A.2d at 1080.

The proposition stated above is not novel. Indeed, the court of appeals opinion herein referred to "the generally accepted statement that business interruption insurance 'is designed to do for the insured in the event of business interruption caused by fire just what the business itself would have done if no interruption had occurred . . .' *National Union Fire Ins. Co.* v. *Anderson-Pritchard Oil Corp.*, 141 F.2d 443 (10th Cir. 1944)." 632 F.2d at 1079.

Petitioner attempts to extend the *Berkeley Inn* court's reference beyond the limited principle for which it is cited. It suggests that the Superior Court approved every aspect

of the district court's reasoning. Yet the issues involved in this matter and the issues in *Berkeley* were entirely different. That case concerned no more than whether the lower court sitting as a trier of fact was correct in its determination that an insured sustained no business interruption loss. The trial judge's conclusion, based on his factual findings, was affirmed by the appellate court in an opinion that is devoid of reference to matters similar to those here in issue. *Berkeley* involved no claim for any contract expense and no question that otherwise bears any relationship to the issues presented by this case.

The principles set forth in *Berkeley Inn* do not conflict with the court of appeals' analysis (632 F.2d at 1078, Note 16) showing a gross covered loss of $5,287,277 which included a projected net profit of $2,856,096. With respect to the two additional elements of the claim, described by Eastern as brokerage and substitute coal expense, the court of appeals found that the language providing insurance coverage made no provision therefor. The court described these as "new expenses."

In *National Surety Corporation* v. *Midland Bank,* 551 F.2d 21 (3rd Cir. 1977) the court dealt with an argument not dissimilar to what Eastern advances based on *Berkeley Inn.* In that case the Third Circuit reversed the district court after concluding that it was not bound by *dictum* enunciated by an intermediate state appellate court. If further stated that even if the relevant discussion in the state court opinion were not *dictum,* it would not be binding since it was rendered by an intermediate appellate court of the state. It is also significant that the state court decision on which the appellant had relied in *National Surety* had cited with approval the district court's decision in *National Surety.* The court of appeals concluded that the mere citation of the district court decision did not constitute adoption of the opinion.

Eastern also refers this Court to *Nusbaum* v. *Hartford Fire Ins. Co.*, 276 Pa. 526, 120 A 481 (1923) and *Nusbaum* v. *Hartford Fire Ins. Co.*, 285 Pa. 332, 132 A. 177 (1926) as authority for its contention that construction of respondents' insurance policies was a matter for the jury.* Both cases were cited in the court of appeals and received comprehensive analysis and treatment in its opinion. *Nusbaum II* was readily distinguished by the court as follows:

> "In *Nusbaum II* the court found no error in the jury's determination of the cause of the insured's loss or calculation of the insured's damages. Eastern argues that *Nusbaum II* stands for the proposition that 'it is for the jury to determine the measure of damages.' (Reply Brief for Appellant-Cross-Appellee at 14). Indeed, *Nusbaum II* permits a jury to determine the value of each element in an insurance policy's formula for recovery. However, the formula for recovery is not a jury question, but a question of law for the judge to determine from the language of the policy." 632 F.2d 1076.

Nusbaum I is equally supportive of respondents' position in that the state court expressly disallowed certain damages awarded by the jury. In describing the items on which testimony had improperly been permitted at trial, the court said:

> "Allowances for none of these could be made under the policy." *Nusbaum* v. *Hartford Fire Insurance Company*, 276 Pa. at 534.

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* The court of appeals opinion herein referred to these cases respectively as *Nusbaum I* and *Nusbaum II*. Such references are retained in this brief.

The decision in *Supermarkets Operating Co.* v. *Arkwright Mutual Ins. Co.*, 257 F.Supp. 273 (E.D. Pa. 1966) cited in Eastern's petition was also before the court of appeals and was disposed of in its opinion (632 F.2d at 1079, Note 17). The court found "Eastern's reliance . . . misplaced" and further pointed out that "[t]he case did not address the question of new expenses."

In addition to arguing that the meaning of respondents' policies was an issue to be submitted to the jury, petitioner contends that the Third Circuit improperly failed to apply what it claims to be the Pennsylvania rule that insurance policies are to be construed in favor of the insured. It is submitted that the court's holding did not reject any accepted principle of construction. The rule enunciated in the cases referred to in the petition is that ambiguous terms in an insurance policy are to be construed against the insurer who prepared that policy. The decision below approved this proposition. The court added, however, that Eastern's policy forms were selected by its representative and were sent to the insurers for execution. Citing the general proposition (in Pennsylvania and elsewhere) that conflicts over the interpretation of ambiguous terms in a contract are to be resolved against the author, the court then said:

> "At a minimum, the above cited cases require that we not construe the language against the defendants." 632 F.2d at 1075.

Whether or not this reasoning is valid and supportable is academic since, as is clear from the opinion, the court found the policies unambiguous:

> "We agree with the insurers and find this language unambiguous. For this reason, the rule that contracts are construed strictly against the insurer cannot apply. *Penn-Air, Inc.* v. *Indemnity Ins. Co. of N.A.*, 439 Pa. 511, 517, 269 A.2d 19, 22 (1970); *Pat-*

> *ton* v. *Patton,* 413 Pa. 566, 573, 198 A.2d 578, 582 (1964); *Miller* v. *Prudential Ins.*, 239 Pa. Super. 467, 472, 362 A.2d 1017, 1020 (1976)." 632 F.2d at 1077.

Thus, the court did not construe the policy in any party's favor, and its holding did not turn on any rule of construction which petitioner claims was improperly applied.

II

The Court of Appeals' construction of respondents' insurance policies as a matter of law did not infringe upon Eastern's right to trial by jury.

Eastern's contention that it has been denied its right to trial by jury must be based on the view that one is entitled to have a jury construe an unambiguous contract. The law is clearly to the contrary. The courts of Pennsylvania follow the unvarying rule that the construction of unambiguous contracts is a matter of law for the court. *Adelman* v. *State Farm Mutual Auto Ins. Co.,* 255 Pa. Super. 16, 386 A.2d 535 (1978); *Blocker* v. *Aetna Cas. & Sur. Co.,* 232 Pa. Super. 111, 332 A.2d 476 (1975). Determination of a question of law by the court does not violate the constitutional right to trial by jury. *Baltimore & Carolina Line, Inc.* v. *Redman,* 295 U.S. 654, 55 Sup. Ct. 890 (1935).

Petitioner's argument does not really involve a question of the right to trial by jury at all; rather, it begs the basic question of whether the court of appeals was correct in finding the contract terms unambiguous and interpreting them as a matter of law. There is ample support for its actions in that regard; see discussion herein at page 6 of *Nusbaum I, Nusbaum II;* and *Adelman* v. *State Farm Mutual Auto. Ins. Co.,* 255 Pa. Super. 116, 123,

386 A.2d 535, 538 (1978); *Blocker* v. *Aetna Cas. & Sur. Co.*, 232 Pa. Super. 111, 114, 332 A.2d 476, 477-478 (1975); both cited by the Court of Appeals at 1077 of 632 F.2d.

POINT III

The Issues herein do not warrant consideration by this Court.

The issues at bar were resolved by the court of appeals in conformity with generally accepted legal principles and with the law of the Commonwealth of Pennsylvania. Petitioner's contention that the Third Circuit did not follow the state law is not borne out by a reading of the cases cited. Not only is *Berkeley Inn* distinguishable on the facts from the instant controversy but it also enunciates propositions of law which are entirely consistent with the decision below.

An examination of the Third Circuit's decision in terms of its ramifications for other litigants indicates that there will be no change in the treatment of controversies and no effect on other actions. The decision approves the propositions that insurance contracts which are ambiguous are to be construed against the insurer who prepared them; that ambiguous contracts are generally to be construed against their author; and that where a contract is not ambiguous it is to be construed by the court as a matter of law. Although Eastern's petition for a writ of certiorari seeks to demonstrate weighty issues concerning trial by jury and the effect of The Rules of Decision Act, this controversy does not involve either of the foregoing. Rather, it concerns the propriety of the court's construction of Eastern's business interruption insurance policies, a matter which has been three times before the Third Circuit.

Rule 17 of the Supreme Court Rules states that review "will be granted only when there are special and important reasons therefor." Eastern's petition does not demonstrate reasons that are either special or important.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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